MOTION FILED

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No. 87-318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRATT & WHITNEY AIRCRAFT DIVISION,
UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

CHRISTINE BALDRACCHI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICA CURIAE* AND MEMORANDUM ON BEHALF OF JONNA LINGLE AS *AMICA CURIAE*

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September 1987

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICA CURIAE*

Jonna Lingle, who has filed a petition for a writ of certiorari, No. 87-259, to review the *en banc* decision of the Seventh Circuit in *Lingle v. Norge,* 823 F.2d 1031 (1987), moves for leave to file this brief as *amica curiae.* Lingle's purpose in filing is to call the Court's attention to jurisdiction and removal problems which may ultimately prevent the Court from reaching the merits if it grants certiorari in this case, and to call the Court's attention to her own petition, which is not scheduled for the same conference as this case and which does not have the jurisdiction and removal problems, and thus is a better vehicle for resolv-

ing the merits issue here. Neither the jurisdiction and removal problems, nor the existence of *Lingle's* petition, are identified in the papers filed by petitioner or respondent.

Because the petition was filed on August 24, 1987, this motion is timely notwithstanding the fact that respondent filed her memorandum on September 4. Supreme Court Rule 36.1. Petitioner's counsel, Peter Healey, Esquire, does not consent to this motion. Respondent's counsel, Laurence Gold, Esquire, neither objects nor consents.

Respectfully submitted,

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QUESTION PRESENTED

In light of the jurisdictional problems in this case, is this the best vehicle for resolving the question of whether section 301 of the Labor-Management Relations Act preempts state retaliatory discharge claims, or should that issue be resolved in another case, *Lingle v. Norge,* No. 87-259, in which the basis for federal jurisdiction is not at issue?

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MEMORANDUM ON BEHALF OF JONNA LINGLE AS *AMICA CURIAE*

Amica curiae Jonna Lingle was the plaintiff-appellant in the decision of the Seventh Circuit, sitting *en banc*, whose conflict with the decision below is cited as a reason why this case should be taken for review. *Lingle v. Norge,* 823 F.2d 1031 (1987). *Amica* agrees that the question presented in the petition merits plenary consideration by this Court, but she is concerned that this may not be the proper case in which to resolve that question because there is a jurisdictional problem in this case, not identified either

in the petition or in the memorandum of the respondent, which may prevent the Court from reaching the important issue that would otherwise be presented.

The complaint in this case alleges that respondent was fired in retaliation for having sought workers compensation benefits. It was originally filed in Connecticut state court, and the only basis for removal was the argument of petitioner Pratt & Whitney that the Connecticut tort of retaliatory discharge is preempted by section 301 of the Labor-Management Relations Act. This district court decided that federal jurisdiction existed because the state claim was preempted, and thus refused to remand to state court. Pet. App. 12a-13a. The court of appeals did not address the question of jurisdiction, but simply decided that the state claim was not preempted, and reversed with instructions to remand to the state courts, given the absence of any remaining federal questions. Pet. App. 4a, 10a.

But as this Court held last Term in *Caterpillar v. Williams,* 107 S. Ct. 2425 (1987), a preemption defense, even under section 301, is not a basis for federal jurisdiction, and consequently is not a basis for removal, unless the employee's state court claim is based on rights granted by the collective bargaining agreement. In *Caterpillar,* by contrast, the employees' claim was based on an alleged separate contract, and the Court held that the employer's section 301 preemption defense based on a claim that any such separate rights were merged into or barred by the collective bargaining agreement, would have to be litigated in state court. *A fortiori,* because respondent here alleged that her rights under state tort law were violated, the petitioner's claim that section 301 preempts the state claim because the collective bargaining agreement contains parallel rights is also an insufficient basis for federal jurisdiction. Indeed, *Caterpillar* is so clearly dispositive that either sum-

mary affirmance or denial of certiorari may be appropriate for that reason, although the reason for remanding to state court would be jurisdictional, rather than because the preemption defense fails, as the Second Circuit held.

This argument is more fully developed in a petition for a writ of certiorari in *Willoughby v. Central Illinois Light Company,* No.87-417, filed on September 11, 1987, at 9 to 12, which was prepared by undersigned counsel. Like this case, *Willoughby* presents yet another issue about the propriety of removal, which is that 28 U.S.C. § 1445(c) bars removal of claims arising under the state workers compensation laws, although again the issue was not discussed by the Second Circuit below or by the certiorari papers here. Our concern is that, in the event the Court grants certiorari in this case, and then holds the remaining cases for disposition in light of *Baldracchi,* the Court would be required to consider the propriety of removal and jurisdiction first. If the Court concluded that removal was unwarranted, it would then have to remand the case without ever reaching the merits of the preemption issue presented in the petition, as it did in *Franchise Tax Board v. Laborers Vacation Trust,* 463 U.S. 1 (1983).

In the petition for a writ of certiorari in *Lingle v. Norge,* No. 87-259, by contrast, federal jurisdiction is based on diversity of citizenship, and so the case can only be decided on the merits.[1] In Lingle's view, the preemption issue can be most cleanly and efficiently decided without the presence of the other issues of removal and jurisdiction, and so she urges that, even if the Court does not believe that the jurisdictional issue is so plain as to warrant summary action, the petition here should be held pending a

[1] Unfortunately, the parties did not mention the pendency of the petition in *Lingle.*

decision in *Lingle*. At the very least, Lingle urges that her petition be considered at a conference together with *Baldracchi* and *Willoughby*, and that the Court decide at that time how to handle all these cases and the issues that they present.

CONCLUSION

The petition for a writ of certiorari in this case should be considered at the same conference as the petitions in *Lingle* and *Willoughby*, at which time the Court should decide which case, or which combination of cases, is the best vehicle for resolution of the preemption and other issues involved.

Respectfully submitted,

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